

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,124

434

ABE FRIBUSH,
Executor of Estate of Harry Chiss,

Appellant,

v.

RICHARD IRVING CHISS
and
JERRY CHISS,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

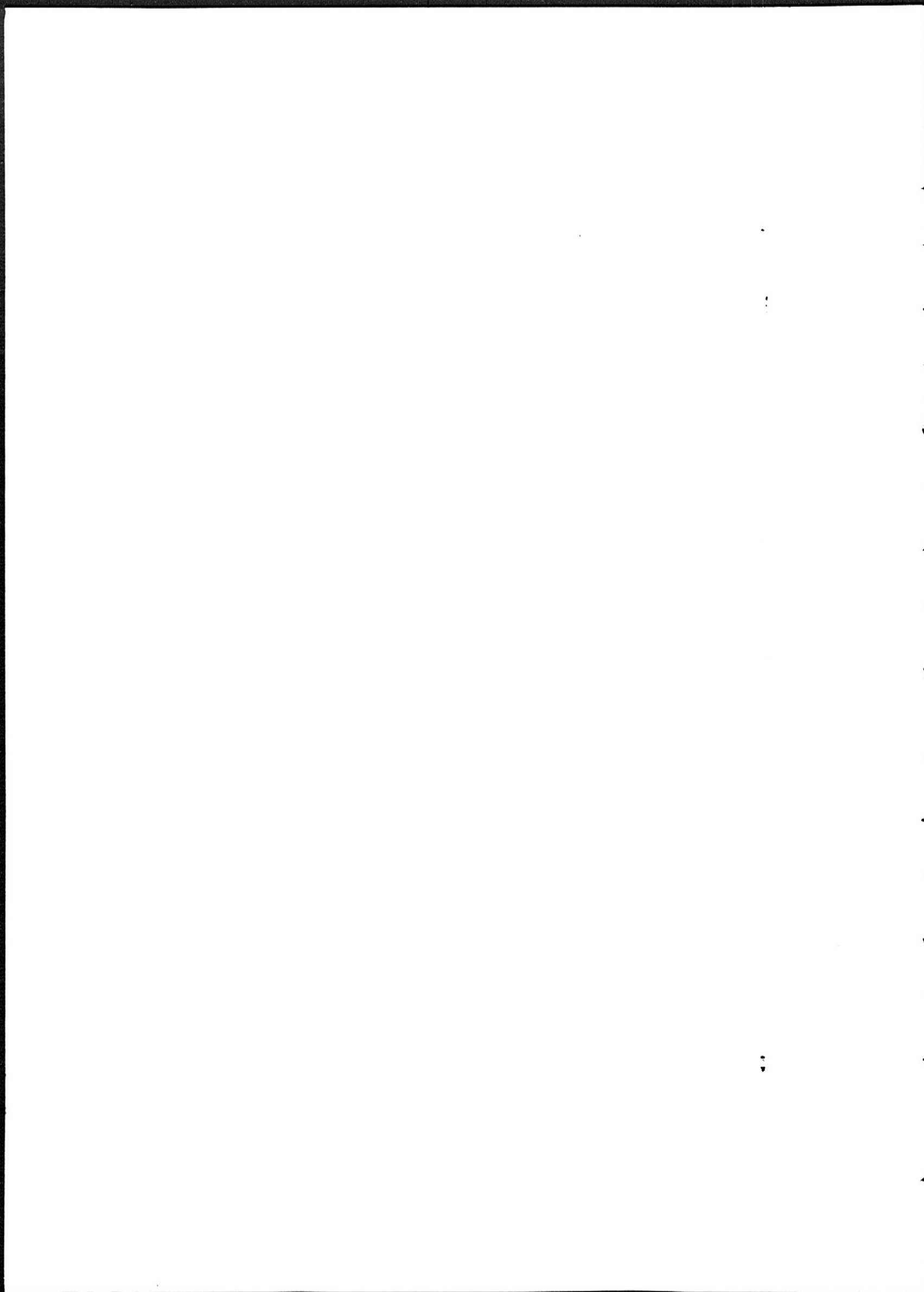
FILED JUN 14 1966

Nathan J. Paulson
CLERK

MILTON M. BURKE

1010 Vermont Avenue, N. W.
Washington, D. C. 20005

Attorney for Appellant



(i)

QUESTION PRESENTED

The question presented by this appeal is:

Whether an executor who performs services of legal and accounting nature in addition to duties of executor and who on an hourly basis would have a recognizable claim in an amount in excess of ten per centum on the amount of the inventory and in which estate there are complexities not requiring litigation but requiring substantial time and expertise is entitled to a claimed commission based upon ten per centum on the amount of the inventory.

(iii)

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

1. The United States District Court for the District of Columbia had original jurisdiction of this action under the provisions of Title 11, Section 501, District of Columbia Code, 1961 Edition.

2. This is an appeal from the Order of that Court, entered January 5, 1966, and jurisdiction herein is based on Title 28, Section 1291, United States Code.

STATEMENT OF THE CASE

Abe Fribush was nominated as the executor in the estate of Harry Chiss and was duly appointed and qualified on the 13th day of June, 1962. Abe Fribush, hereinafter referred to for convenience as the executor, is a member of the Bar of the District of Columbia and has been such for almost thirty years and has been actively engaged in the practice of law in the District of Columbia since that time. In addition, he is and has been a public accountant since 1938 and has been actively engaged as a practicing public accountant since 1946.

The executor, upon being appointed and qualifying as executor in the Estate of Harry Chiss, immediately undertook the duties required of him as such executor and by reason of his professional qualifications as both lawyer and accountant executed and accomplished all phases of administration of the said estate without engaging the services of a lawyer or an accountant, both of which would in the absence of qualification of the executor have been necessitated by the requirements of the estate, at great expense to the estate.

The executor was charged with the tangible personal property and with proceeds of numerous building associations and bank accounts, the probate account showing an inventory of assets in the amount of \$107,-668.52, all of which required time and attention for the safeguarding of such assets, and in addition thereto the executor took charge of real property owned by decedent, the value of which was not included in the inventory of assets but for which the executor was required to attend to repairs, maintenance, and the acquisition of a tenant with the incidental requirements of preparation of and execution of leases, collection of rent, and other incidental matters.

The executor duly prepared and filed the petition for probate of the Will and well as other appropriate documents and an account, all of which required conferences and correspondence with the interested parties,

and ascertaining validity of and satisfying obligations of the decedent and of the estate.

The executor personally and without subjecting the estate to additional expenses prepared and filed numerous inheritance and income tax returns, including the preliminary and Federal estate tax returns, District of Columbia inheritance tax returns, local and Federal income tax returns. For the year 1962 additional time was required for the filing of two special Federal and District of Columbia income tax returns, one on behalf of the estate and one on behalf of the decedent.

The executor also held various conferences with representatives of the Veterans Administration in connection with insurance policies.

Although the executor did not keep strict record of the amount of time required of him in the administration of the Estate of Harry Chiss, he was able to reconstruct the records and to substantiate a minimum of 450 hours.

Both Richard Irving Chiss and Jerry Chiss were advised of all steps of the administration of the estate and were most familiar with the effort and time required of the executor in the performance of his duties. Jerry Chiss readily consented to the fee fixed by the executor, which consent was dated February 10, 1964. Richard Irving Chiss did not formally acknowledge his consent to the proposed fee of the executor.

Objections to the fee claimed by the executor were filed on behalf of Jerry Chiss on or about March 25, 1964, and on behalf of Richard Irving Chiss on or about March 23, 1964. A memorandum of the executor in support of his claim for compensation and his reply to such objections was filed on behalf of the executor on December 6, 1965, with a statement of services.

Upon oral argument to the objections and reply thereto, the Court authorized an executor's fee from the Estate of Harry Chiss in the amount of \$6,500.00, which order was entered on the 5th day of January, 1966.

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The executor was charged with the tangible personal property and with proceeds of numerous building associations and bank accounts, the probate account showing an inventory of assets in the amount of \$107,-668.52, all of which required time and attention for the safeguarding of such assets, and in addition thereto the executor took charge of real property owned by decedent, the value of which was not included in the inventory of assets but for which the executor was required to attend to repairs, maintenance, and the acquisition of a tenant with the incidental requirements of preparation of and execution of leases, collection of rent, and other incidental matters.

The executor duly prepared and filed the petition for probate of the Will and well as other appropriate documents and an account, all of which required conferences and correspondence with the interested parties,

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STATEMENT OF POINTS

The Order of the Court setting executor's fee at \$6,500 is arbitrary, capricious, unreasonable and is not founded upon substantial evidence, the amount of the fee so ordered being grossly inadequate and the amount of the claimed commission in the amount of \$10,786.85 being substantially supported.

ARGUMENT

Appellant has performed services as executor of the Estate of Harry Chiss fully and without incurring collateral expenses for the services of an attorney or for the services of an auditor. Section 20-605 of the District of Columbia Code, 1961 Edition, provides in applicable part as to the executor that

"[H]is commissions, which shall be at the discretion of the court, not under one per centum nor exceeding ten per centum on the amount of the inventory or inventories, . . ."

and further provides for "allowance for costs, attorneys' fees and extraordinary expenses which the court may think proper to allow."

In support of his claim for commission in the amount of 10% of the inventory shown on the First Account, which account does not include the value of real property, the appellant furnished to the Court a memorandum indicating the various phases of legal and accounting activities in addition to the usual and ordinary duties of an executor, along with a statement of the number of hours spent in rendering such services. The complexities of the estate have not involved litigation which appellant believes is not an overriding criterion for determination of the value of services rendered inasmuch as the proper handling of an estate tax return, for example, may require more time than simple litigation. This case presents facts much stronger than one in which the executor acts

as both executor and counsel in that appellant also included in his work the work of an accountant which was of substantial nature in view of the various tax returns required.

The appellant has pointed out that the United States Treasury Department, Internal Revenue Service, recognized the reasonableness of the amount claimed by the executor and accepted for Federal estate tax purposes the amount deducted for such expense on the United States Estate Tax Return, Form 706, filed by the executor in connection with this estate.

To further establish the reasonableness of his claim for a fee in the amount of \$10,786.85, appellant determined from his record that he had expended a minimum of 450 hours in the administration of his duties in connection with this estate. The Bar Association of the District of Columbia and other bar associations, such as that of the City of New York, after thoroughly reviewing the status of legal fees and a uniform rate which is desired to be in general use for services rendered, have recommended a minimum fee of twenty-five dollars (\$25.00) per hour for lawyers with maximum ranging to as much as one hundred dollars (\$100.00) per hour depending on the stature of the lawyer in his profession and the years of service. The appellant has been a member of the Bar for the greater part of his adult life, a period of almost thirty years, and would be entitled to legal fees of not less than \$25.00 per hour, which rate should also apply to audit matters inasmuch as the executor's having performed the services himself obviated both the cost of the auditor as well as the time which would otherwise have been necessary for conferences with an auditor and review of the work of the auditor. It was said *In re Estate of Annie E. Henshaw*, Lunacy #6074, 1925, 53 W.L.R. 662, quoting favorably from *Holding v. Allen*, 1924, 150 Tenn. 669, 266 S.W. 772, 36 A.L.R. 743:

"An executor cannot be allowed compensation as attorney for legal services rendered to himself as such in

the care of the estate, although his compensation as executor may be larger because of such services than he would otherwise receive."

Fair compensation therefore could readily exceed \$11,250.00.

CONCLUSION

Appellant respectfully submits that on the facts and within the intent of the law, the order of the United States District Court for the District of Columbia setting the executor's fee at \$6,500.00 was clearly arbitrary capricious, unreasonable and not founded upon substantial evidence.

For the reasons hereinbefore advanced, the order of the lower court should be amended to allow appellant the full amount of the claimed executor's commission in the amount of \$10,786.85.

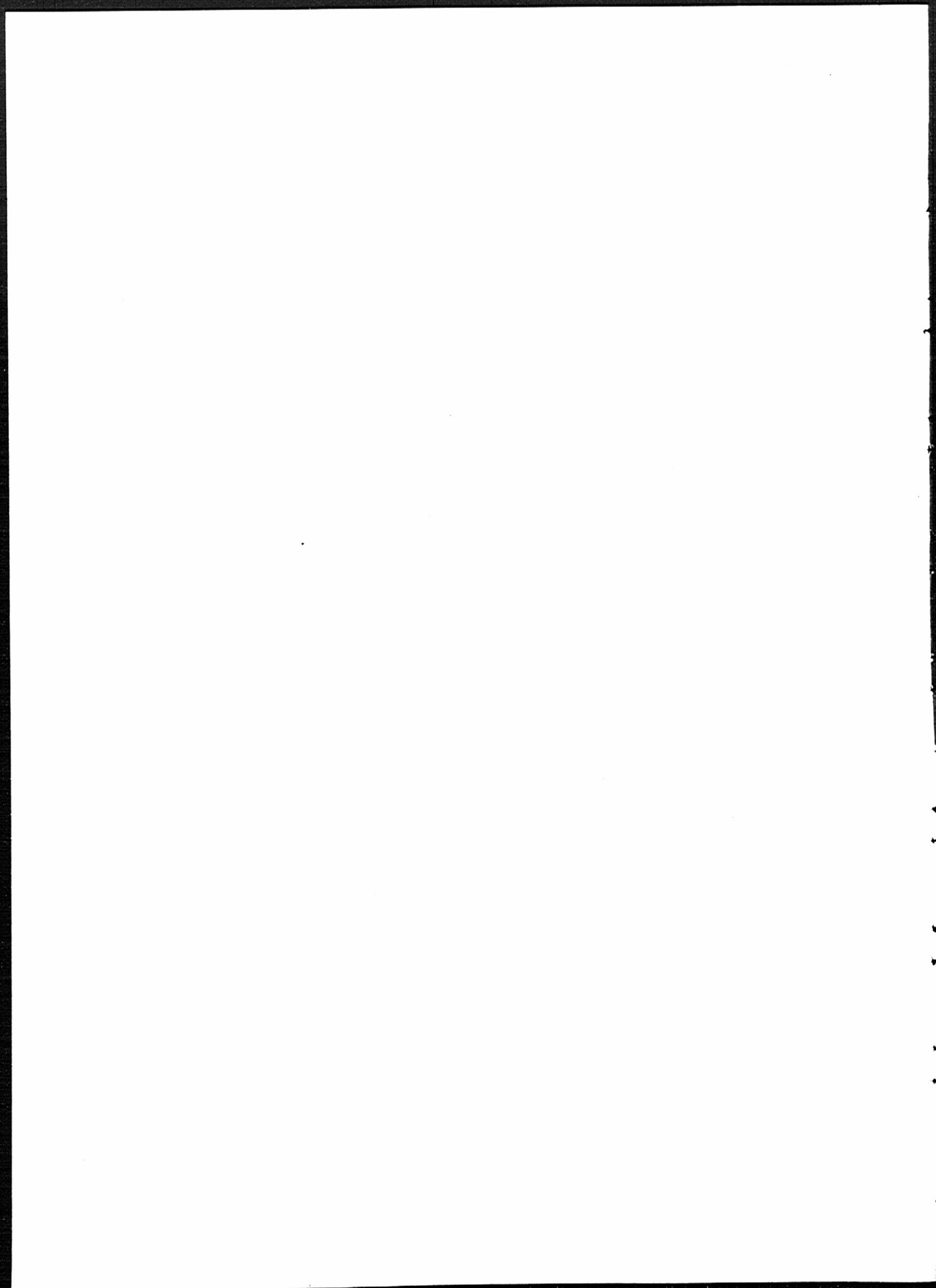
Respectfully submitted,

MILTON M. BURKE
1010 Vermont Avenue, N. W.
Washington, D. C. 20005
Attorney for Appellant

(i)

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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding Probate Court

IN RE:

ESTATE OF HARRY CHISS,

Administration No. 106,015

Deceased

OBJECTIONS TO CLAIMED FEE OF EXECUTOR

Comes now JERRY CHISS, and withdrawing his consent under Rule 48, as amended and supplemented, filed herein heretofore, and for objection to the fee requested by the executor in the First and Final Account filed by him herein on the 3rd day of October, 1963, and states:

1. Said executor claims a fee of \$10,786.85 for his services as both attorney and executor in this case.
2. That the case was simple and uncomplicated and required no extraordinary services or proceedings.
3. That the sum claimed is grossly excessive.
4. That at the time of the signing of the Consent under Rule 48, said Jerry Chiss had no knowledge of the lack of complexity of the services rendered.

Dated the 30th day of Aug., 1965.

/s/ Illegible
Witness

/s/ My Mark (X) (SEAL)
Jerry Chiss

I HEREBY CERTIFY that a copy of the foregoing was mailed, postage prepaid, the 28th day of Sept., 1965, to Abe Furbush, Esquire, 1029 Vermont Avenue, Washington 5, D.C.

Robert L. Millard, Esquire
Attorney for Jerry Chiss

OBJECTIONS TO CLAIMED FEE OF EXECUTOR

Comes now RICHARD IRVING CHISS and for objection to the fee requested by the executor in the First and Final Account filed by him herein on the 3rd day of October, 1963, and states:

1. Said executor claims a fee of \$10,786.85 for his services as both attorney and executor in this case.
2. That the case was simple and uncomplicated and required no extraordinary services or proceedings.
3. That the sum claimed is grossly excessive.

Dated the 8th day of Sept., 1965.

/s/ Martin L. Epstein
Witness

/s/ Richard Chiss (SEAL)
Richard Irving Chiss

I HEREBY CERTIFY that a copy of the foregoing was mailed, postage prepaid, the 28th day of Sept., 1965, to Abe Fribush, Esquire, 1029 Vermont Avenue, Washington 5, D.C.

Robert L. Millard
Attorney for Richard Irving Chiss

**MEMORANDUM OF EXECUTOR IN SUPPORT OF HIS CLAIM
FOR COMPENSATION AND REPLY TO OBJECTIONS**

Comes now Ave Fribush, duly nominated, appointed and qualified executor in the above-numbered estate, in support of his claim for compensation and in reply to the objections filed to such claim for compensation, states as follows:

1. That he was nominated as the executor in the estate of the decedent and was duly appointed and qualified on the 13th day of June, 1962. That he is a member of the Bar of the District of Columbia and has been such for almost thirty years and has been actively engaged in

the practice of law in the District of Columbia since that time. That in addition to being a member of the Bar of the District of Columbia he is and has been a public accountant since 1938 and has been actively engaged as a practicing public accountant since 1946.

2. That upon being appointed and qualifying as executor in the above entitled estate he immediately undertook the duties required of him as such executor and by reason of his profession as both lawyer and accountant it was not necessary for him to engage the services of a lawyer and an accountant which would otherwise have been necessary because of the requirements of the estate.

3. That he personally took charge of funeral arrangements, interment, including communicating with relatives in Chicago and elsewhere. He took charge of the real estate which was held by this estate and immediately attended to necessary repairs which was required by such property and to the acquisition of a tenant for the same with the incidental requirements for the execution of leases and other incidental attentions. He prepared the petition for probate of the Will and all other appropriate documents corresponding with the interested parties. He prepared and filed the preliminary and all final Federal estate tax returns as well as District of Columbia inheritance tax returns and local and Federal income tax returns. All of these were most complicated and required considerable time, effort and skill for the very complicated preparation. For the year 1962 additional time was required to file two special Federal and D.C. income tax returns, one in behalf of the estate and one in behalf of the decedent. He prepared all records for the Probate Court, accounting for all paid bills and other accountable items. He obtained and prepared all records of eight building associations and bank passbooks for a period of three years. He held various meetings with representatives of the Veterans Administration in connection with the insurance policies. He had numerous meetings with Richard Irving Chiss, one of the sons of the decedent and a legatee herein, reviewing

various items involved in this estate, all of which took considerable time. Both Richard Irving Chiss and his brother, Jerry Chiss, were most familiar with the effort and time put into this estate with the executor giving copies of most of the formal documents and having been shown all others to the end that Jerry Chiss readily consented to the fee fixed by the executor which consent was dated February 10, 1964. That the executor believes and therefor alleges that the said Jerry Chiss was influenced by others to withdraw such consent and that he does not truly believe that the amount the executor claims is not most reasonable.

4. That Section 20-605 of the Code of Laws for the District of Columbia provides for an allowance of a sum not less than 1% and not more than 10% of the inventory of the decedent and the amount claimed by the executor amounts to approximately 8-1/2%. The Court recognized that an executor who acts as both executor and counsel and who is a member of the Bar of the District of Columbia, is entitled to a greater rate of compensation than a non-lawyer executor particularly one who has engaged counsel who must be paid out of the estate. That the United States Treasury Department, Internal Revenue Service recognized the reasonableness of the amount claimed by the executor by its approval of such amount suggested as an expense of the estate in the United States Estate Tax Return, form 706, filed by the executor in connection with this estate. That this case presents facts much stronger than one in which the executor acts as both executor and counsel in that this executor also included in his work the work of an accountant without charging additional fees for accountancy and such fees would have been substantial in view of the various tax returns required.

5. That while the executor did not keep accurate time records showing the exact amount of time he put into the administration of his duties in connection with this estate, he estimates that he had expended a minimum of Four Hundred and fifty (450) hours (as per his statement of services attached hereto and made part hereof). The Bar Association

of the District of Columbia and other Bar Associations, such as that of the City of New York, after thoroughly reviewing the status of legal fees and a uniform rate which is desired to be in general use for services rendered, have recommended a minimum fee of Twenty-five (\$25.00) Dollars per hour for lawyers with maximums ranging to as much as One Hundred (\$100.00) Dollars per hour depending on the stature of the lawyer in his profession and the years of service. This executor has been a member of the Bar for the greater part of his adult life, a period of almost thirty (30) years, and would be entitled to legal fees of not less than Eleven Thousand and Two Hundred and Fifty (\$11,250.00) Dollars, at the rate of twenty-five (\$25.00) Dollars per hour, the minimum recommended rate. Based upon his years of service he would be entitled to compensation of much more than twenty-five (\$25.00) dollars per hour. Fair compensation to such executor could readily exceed \$11,250.00. A claim therefor by this executor of Ten Thousand, Seven Hundred and eighty-six (\$10,786.85) Dollars and eighty-five cents, which is less than the minimum recommended rate for young lawyers and which includes his services both as a lawyer and as an accountant, is certainly a most reasonable and more than fair claim.

6. The claims of the two sons of the decedent, Richard Irving Chiss and Jerry Chiss, that the executor's claimed fee is excessive, based upon a statement that this case was simple and uncomplicated, is certainly not founded upon fact or reason and the executor invites the Court to examine the two very bulky and extensive files compiled by the executor which is only partially indicative of the extensive amount of time and effort given to this estate by the executor. Observation by the objectors that this estate required no extraordinary services is in itself inconsistent with the practice and authorities on this subject in that had this estate required extraordinary litigation the authorities and the D.C.

Code (Sec. 20-605) provide for the payment of extraordinary fees over and above the maximum permitted by the D.C. Code.

Respectfully submitted

/s/ Milton M. Burke
Attorney for Executor, Abe Fribush

[Certificate of Service
December 6, 1965]

STATEMENT OF SERVICES

Comes now Abe Fribush, duly appointed and qualified executor in the above-entitled estate and respectfully states to the Court that a thorough review of his file and records in the above-entitled estate and reasonable computation of the time extended in connection with the administration of the same and the performance of his duties as executor, that he believes and therefor verily alleges that he extended a minimum of 450 hours on account of the said estate. That the nature of his work in connection with his duties as executor in which he gave both legal and accounting services, are more fully described in the memorandum filed herewith by his attorney, Milton M. Burke, in connection with his claim for compensation.

Respectfully submitted,

Abe Fribush

ORDER SETTING EXECUTOR'S FEE AT \$6,500.00

Upon consideration of the Objection to the Claimed Fee of the Executor of the Estate of Harry Chiss, by the beneficiaries, Richard Chiss and Jerry Chiss, by their attorney, Robert L. Millard, and the answer filed and argued by Milton M. Burke for the Executor, Abe Fribush, it is by the Court this 5th day of January, 1966,

ORDERED, that the said Executor, be and is hereby authorized an Executor's fee from the Estate of Harry Chiss in the amount of \$6,500.-00 for services rendered, and that any sums claimed or paid in excess of this amount shall be and are hereby disallowed, and to the extent paid in excess of the authorized fee of \$6,500.00, shall be refunded to the Estate of Harry Chiss.

Judge of the Probate Court
For the District of Columbia

[Certificate of Service]

NOTICE OF APPEAL

Notice is hereby given this 4th day of February, 1966, that Abe Fribush, Executor of Estate of Harry Chiss, hereby appeals to the United States Court of Appeals for the District of Columbia from the order of this Court entered on the 5th day of January, 1966 in favor of estate against said executor.

Milton M. Burke
Attorney for Abe Fribush,
Executor of Estate of Harry Chiss

[Service]
